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No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Timothy Joseph Donovan, *Petitioner*,

v.

The State of California, *Respondent*.

On Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara

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PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED FOR REVIEW

1. With respect to misdemeanor traffic offenses such as driving under the influence, what is the nature and extent of the probable cause which a police officer must have under the Fourth Amendment to the United States Constitution and *Whren v. United States* 517 U.S. 806 (1996) before the officer may single out a particular motor vehicle and order its driver to pull over to the side of a road and stop?

2. More specifically, under the Fourth Amendment to the United States Constitution and *Whren v. United States* 517 U.S. 806 (1996), may a police officer order the driver of a particular motor vehicle to pull over to the side of a road and stop based solely on a cellular telephone report from a lay informant of a traffic violation which the officer has not observed?

LIST OF THE PARTIES

(There are no parties in this action other than the parties which are named in the caption to this Petition. Timothy J. Donovan, petitioner herein, was the only defendant and petitioner in the state court proceedings. The State of California (also known as "the People of the State of California), respondent herein, was the only plaintiff and respondent in the state court proceedings.)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
List Of Parties	ii
Table Of Contents	iii
Table Of Authorities	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. Factual Background	3
B. Procedural History	7
REASONS FOR GRANTING THE WRIT	10
A. The Large Number Of Traffic "Stops" In America Each Year	11
B. The Proliferation Of Cellular Telephones	12
C. The Constitutional Law With Respect To Traffic Violations Needs Clarification.	13
D. *Willard* Is In Conflict With *Whren*.	18
CONCLUSION	20
APPENDIX:	
A. Order Of Appellate Division Affirming Judgment	1a
B. Order Of Appellate Division Denying Certification To California Court of Appeal	2a
C. *People v. Willard* (1986) 183 Cal.App.3d Supp. 5	3a

TABLE OF AUTHORITIES

Cases:

Knowles v. Iowa 20
U.S. S. Ct. No.97-7597 (12-8-98)

Michigan Dept. of State Police v. Sitz 16
496 U.S. 444 (1990)

People v. Willard (1986) 2, 8-13, 18-19
183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895

Terry v. Ohio 15, 17
392 U.S. 1 (1968)

Whren v. United States i, 8-10, 13-
517 U.S. 806 (1996) 16, 18-20

United States v. Cortez 19
449 U.S. 411 (1981)

United States v. Martinez-Fuerte 16
428 U.S. 543 (1976)

Statutes and Rules:

28 U.S.C. Section 1257(a) 2
U.S. Supreme Court Rule 10 10
California Vehicle Code Section 21303 3
California Vehicle Code Section 23152 4, 6-7
California Civil Code Section 3510 16
California Code of Regs., Tit. 17, Sect. 1219.3 7
California Code of Regs., Tit. 17, Sect. 1221.4 6
California Rules of Court, Rule 63 2, 10, 12
California Rules of Court, Rule 106 1, 9, 12
California Rules of Court, Rules 180-191 9

Miscellaneous:

74 ALR3d 1138 18-19
R.J. Essen, Defense of Drunk Driving Cases 19

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Timothy Joseph Donovan, *Petitioner*,

v.

The State of California, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

Timothy Joseph Donovan, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Santa Clara in this case.

OPINIONS BELOW

As described more fully, *infra*, the Appellate Department of the Superior Court was the state court of last resort for the misdemeanor conviction in this case. Under Rule 106 of the California Rules of Court, that court was not required to (and did not in this case) write an opinion in support of its decision.

STATEMENT OF JURISDICTION

The Appellate Department of the Superior Court of the State of California entered its judgment in this case on November 23, 1998 (App., *infra*, 1a). Petitioner

then applied (pursuant to Rule 63 of the California Rules of Court) for an order certifying this case to the California Court of Appeal for review. On December 14, 1998, the Appellate Department entered its order denying that application (App., *infra*, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS

There are no statutes at issue in this appeal. There is, however, a reported opinion, *Willard v. Superior Court* (1986) 183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895, upon which respondent herein relied. In that case the court held that "it is well established in California that a police officer may detain and question a citizen under circumstances short of probable cause to arrest." (*Id.* at 9 (also at App., *infra*, 6a).) As in this case, the court in *Willard* upheld the "stop" of a motor vehicle based solely upon the report of a lay informant.

STATEMENT OF THE CASE

On April 27, 1996, the California Highway Patrol ordered petitioner to pull his motor vehicle (containing himself and passenger) over to the side of a highway and stop. The highway patrol officer who gave this order had not observed petitioner violate any traffic laws. The order was based solely on the report of a lay informant transmitted to the highway via the informant's cellular telephone. After petitioner was charged with driving under the influence of an alcoholic beverage, petitioner filed a motion to suppress the fruits of this "stop" with the trial court on the grounds that it was not in accord with the Fourth and Fourteenth Amendments to the United States Constitution. The trial court's order

denying this motion, was affirmed by the state appellate court of last resort in this case.

In this Statement petitioner will first set forth the factual background and then the procedural history of this case. (The portions of the state trial court clerk's transcripts ("CT") and reporter's transcripts ("RT"), referred to *infra*, are not appended to this petition.)

A. Factual Background: On April 27, 1996, at approximately 4:45 p.m., petitioner left a wine-tasting festival driving his car with a friend, Lila Lukic, as his passenger. (RT (12-11-97 pm) 19.) During the next 25 miles, as they went westbound on Highway 152 (then northbound on Highway 101), petitioner and Lila Lukic repeatedly noted to one another how a white pickup truck (as it later turned out, driven by Ron Iudice, the prosecution's lay informant) was closely "tailgating" them. (*Id.* at 20-24.) Ron Iudice later told petitioner's investigator that petitioner had somehow prevented him from passing which angered Ron Iudice. (*Id.* at 58-59.) At trial Ron Iudice testified that petitioner had "pulled ahead" of him but that it did not "bother" him. (RT (12-9-97) 37.) Lila Lukic testified that at all times petitioner was driving in a safe manner and at no time did he appear to be under the influence of an alcoholic beverage. (RT (12-11-97 am) 72-74.)

At approximately 5:04 p.m. Ron Iudice used his cellular telephone to tell the California Highway Patrol (CHP) that he was "behind a vehicle that's weaving all over the road". (CT 50, 77.) The CHP then transferred Ron Iudice's call to its Monterey branch, describing the call as a report of "a 23103" (i.e., California Vehicle Code Section 23103, reckless driving). (CT 50.)

At approximately 5:07 p.m., as he was apparently approaching the Minstrel Vineyards on Highway 152, Ron Iudice told the Monterey branch of the CHP: (1) petitioner's "supposed to be goin' off towards the right part but he goes off to the left"; (2) "Looks like he's ah, signaling left to stay on 152, I'm gonna stay behind him"; and (3) "Ah, maybe he's not drunk, you know, I mean he's [inaudible]". (CT 52-53.) It is not clear what Ron Iudice meant by his first two statements, *supra*. Petitioner did turn left as he signaled that he would do. (CT 52.) After the third statement, the CHP concluded the conversation by telling Ron Iudice that it would put out a broadcast to its patrol cars. (CT 53.) In response to repeated discovery requests in this case, the prosecution was unable to produce any tape of such a broadcast.

In any event, at approximately 5:11 p.m., Ron Iudice called the CHP a second time to say that he had "just called about a suspected drunk driver on Highway 152". (CT 53.) The CHP employee interrupted him to transfer his call to its Monterey branch, this time describing the call as a "23152" (i.e., California Vehicle Code Section 23152, driving under the influence). (CT 54.) The Monterey branch of the CHP obtained a description and current location of the vehicle, ended the conversation, and put out a broadcast to its patrol cars, at approximately 5:14 p.m., telling them to be on the look out for "a possible 23152", describing the vehicle and its location (i.e., northbound 101), and concluding with the statement, "no further at this time". (CT 55-56.)

At approximately 5:19 p.m., approximately ten miles north of the intersection of Highways 101 and 152, northbound on Highway 101, CHP Officer Chandler spotted both petitioner's car and Ron Iudice's pickup truck. (RT (6-2-97) 13-14.) At that time Officer

Chandler was alone in his patrol car parked in the center divide of Highway 101. (*Id.* at 13.) He pulled on to the highway and used his public address system to ask Ron Iudice if petitioner's car was the car he had called about. (*Id.* at 10.) Ron Iudice indicated yes and drove off. (*Id.* at 10, 29.) Officer Chandler went behind petitioner's car and ordered him to pull over to the side of the road and stop which petitioner did without incident. (*Id.* at 10, 28.) At no time did Officer Chandler observe petitioner driving in an unsafe manner. (*Id.* at 27-29; RT (12-10-97) 19-20, 87.)

There is a dispute as to what was and was not first said between Officer Chandler and petitioner. Officer Chandler testified that: (1) he first told petitioner that a motorist had reported that he was "a possible drinking driver"; (2) then he asked petitioner, "if he had been drinking", to which petitioner responded, "no"; and (3) only after the field sobriety tests had been administered did petitioner finally admit that he had sampled some wine. (RT (6-2-97) 16, 19.) Petitioner and Lila Lukic, on the other hand, testified that Officer Chandler first spoke to them in an accusatory fashion as follows: "appears to me that you people are driving under the influence". (RT (12-11-97 pm) 25, 51; RT (12-11-97 am) 74-75.) Thus, Officer Chandler claims that petitioner lied to him whereas petitioner and Lila Lukic both testified that Officer Chandler asked a significantly different and more pointed question--not "Did you drink?"-- but "Were you driving under the influence?". It is undisputed that at some point petitioner did tell Officer Chandler that he sampled some wine at a wine-tasting festival. (RT (6-2-97) 19; RT (12-9-97) 54-55.)

In his arrest report Officer Chandler wrote that there was an odor of alcohol in petitioner's car,

petitioner's eyes were red, and his speech was "slightly slurred". (CT 2, 6.) At trial Officer Chandler added that he smelled an odor of alcohol on petitioner's breath, petitioner's "speech was slightly slurred but not significantly so", and his eyes were a "little red, not bloodshot". (RT (12-9-97) 55; RT (12-10-97) 86.) Officer Chandler acknowledged that his observations regarding petitioner's eyes and speech might not be significant. (RT (12-10-97) 86.)

Officer Chandler testified that after completing a few field sobriety tests he could not form the opinion that petitioner was under the influence of alcohol. (RT (6-2-97) 41.) Accordingly, he asked petitioner to blow into a Portable Alcohol Screening (PAS) device once (which petitioner did). (CT 2.) California Code of Regulations, Title 17, Section 1221.4(a)(1), requires two breath samples before a PAS device may be used to indicate the amount of alcohol in a person's system. However, the result of Officer Chandler's single test was admitted into evidence at the suppression hearing to show that there was some alcohol in petitioner's system, apparently on the theory that Officer Chandler had caught petitioner in a "lie" (i.e., petitioner "was still maintaining he had nothing to drink"). (RT (6-2-97) 41.) Only at this point (i.e., 5:30 p.m.) did Officer Chandler believe he had cause to take petitioner into custody. (*Id.* at 41-42. CT 7.)

At the police station Officer Chandler administered two breathalyzer tests on petitioner. (RT (12-10-97) 52-59.) The first test was administered at 5:54 p.m. and indicated a blood alcohol level of 0.11. (CT 4, 7.) The second test was administered at 5:56 p.m. and indicated a blood alcohol level of 0.10. (*Id.*) The legal limit in California is 0.08. (California Vehicle

Code Section 23152(b).) At trial petitioner strongly contested the manner in which these tests had been administered, specifically, whether or not Officer Chandler had complied with the requirement that a subject must be continuously observed for at least 15 minutes prior to the administration of a breathalyzer test. (California Code of Regulations, Title 17, Section 1219.3.)

B. Procedural History: Officer Chandler's arrest report indicates that: (1) he ordered petitioner to pull over to the side of the road at 5:20 p.m.; (2) his "PROBABLE CAUSE for stop or contact" was a "citizen's report of poor driving"; and (3) he "arrested" petitioner at 5:30 p.m. (i.e., after a PAS test which he reports occurred at 5:29 p.m.). (CT 7 (block letters in original).) His report also indicates that he mirandized petitioner at 6:07 p.m. (CT 1.)

On May 15, 1996, respondent filed a Misdemeanor Complaint with the South County Facility of the Santa Clara County Municipal Court (hereinafter "the trial court") alleging in two counts that petitioner violated California Vehicle Code Sections 23152(a) (i.e., driving under the influence of an alcoholic beverage) and 23152(b) (i.e., driving with a blood alcohol level in excess of 0.08 percent), respectively.

On April 8, 1997, petitioner filed a motion with the trial court seeking to suppress the following:

> "All evidence, tangible and intangible, seized or obtained after and as a result of an officer of the California Highway Patrol ordering [petitioner's] vehicle to pull over to the side of the road some

> pull over to the side of the road some time prior to 5:30 p.m. on April 27, 1996." (CT 46-47.)

This motion was made on the grounds that petitioner's rights, under the Fourth and Fourteenth Amendments to the United States Constitution, were violated because "the aforesaid police action constituted a warrantless seizure of [petitioner's] person which was not supported by probable cause." (CT 47.)

In the Memorandum of Points and Authorities which petitioner filed in support of this motion he relied upon this Court's recent decision in *Whren v. United States* 517 U.S. 806 (1996) wherein the Court held: "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." (*Id.* at 810. CT 57.) In opposition to this point respondent cited the California case of *People v. Willard* (1986) 183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895 (also at App., *infra*, 3a), for the proposition that "circumstances short of probable cause may justify a detention" or traffic stop. (CT 89.)

On June 2, 1997, after testimony was taken from Officer Chandler and the prosecution's informant, Ron Iudice, the hearing of petitioner's motion to suppress was continued to June 30, 1997. (CT 75-76.) On that day the trial court denied the motion ruling that:

> "The Court does not believe that the Whren case, W-h-r-e-n, changes the burden in such a way that it would defeat a finding of sufficient cause for the detention as opposed to cause for an arrest." (RT (6-30-97) 5.)

The trial court also found the *Willard* case, *supra*, to be "instructive" and "still apropos". (RT (6-30-97) 3.)

After a five day trial of this matter the jury returned a verdict of guilty on both counts. (CT 218-219.) With the exception of the testimony of Ron Iudice, all of the evidence offered at trial against petitioner were fruits of the above traffic "stop" (i.e., Officer Chandler's testimony re petitioner's appearance, his contention that petitioner had lied to him, the field sobriety tests, the PAS test, and the breathalyzer tests).

In California one may only appeal a misdemeanor conviction in the Municipal Court of a county to the Appellate Department of the Superior Court of that county. (See California Rules of Court, Rules 180-191.) After his motion for a new trial was denied on February 23, 1998, petitioner timely filed a Notice of Appeal with the trial court on February 27, 1998.

On August 27, 1998, petitioner filed his Appellant's Opening Brief ("AOB") with the Appellate Department of the Superior Court for Santa Clara County. In that brief he again raised the constitutionality of the traffic "stop" in this case under the Fourth and Fourteenth Amendments to the United States Constitution and the *Whren* case, *supra*. (AOB 1, 13-15.) In its Respondent's Brief ("RB") respondent again relied upon the *Willard* case, *supra*. (RB 6, 8.)

On November 23, 1998, the Appellate Department of the Superior Court entered its Order affirming the judgment of the trial court. (App., *infra*, 1a.) Under California Rules of Court, Rule 106, the Appellate Department was not required to (and did not in this case) file an opinion in support of its decision.

The only recourse remaining to petitioner in the California state court system was to file an "Application for an Order Certifying This Case for Transfer to the California Court of Appeal" with the Appellate Department. (See California Rules of Court, Rule 63.) Petitioner did this in a timely fashion on December 4, 1998. Petitioner's sole argument in that Application was that the *Willard* case, *supra*, was in clear conflict with the decision of this Court in the *Whren* case, *supra*. The Appellate Department entered its Order denying the Application on December 14, 1998. (App., *infra*, 2a.)

REASONS FOR GRANTING THE WRIT

In deciding whether to grant a petition for writ of certiorari this Court considers whether a state court:

> "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Supreme Court Rule 10(c).)

There are at least four reasons under this Rule why the Court should grant a writ of certiorari in this case: (1) the vast number of Americans who are "stopped" each year for suspected traffic violations such as driving under the influence; (2) the proliferation of Americans using cellular telephones in their motor vehicles to, among other things, make reports to the police (3) the resulting need for clearer constitutional standards with regard to the decision of police officers to order a particular vehicle to pull over to the side of the road based solely on the tip of a lay informant; and (4) the conflict between *Whren v. United States* 517 U.S. 806

(1996) and *People v. Willard* (1986) 183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895.

A. <u>The Large Number Of Traffic "Stops" In America Each Year</u>: A report prepared by the California Department of Justice, entitled "Crime & Delinquency in California, 1996", indicates that of the 1,051,453 misdemeanor arrests which occurred during 1996 in California 195,716 were for driving under the influence. (*Id.* at pages 33, 63.) In other words, over 18 percent of all misdemeanor arrests in California during 1996 were for driving under the influence.

The population of California is approximately 11 percent of the total population of the United States of America. It would appear reasonable to assume that California's misdemeanor arrest statistics are typical of the rest of the Union. If this is so, then, using a multiple of 9, there were over 1,750,000 misdemeanor arrests for driving under the influence in this country during 1996.

In addition, it must be noted that not every traffic "stop" results in an "arrest" for driving under the influence. For example, the arresting officer in this case testified that during his eight year career as a patrol officer he "investigated well over seven thousand" persons suspected of driving under the influence but only 400-500 of those investigations resulted in "arrests". (RT (6-2-97) 17.) In other words, the typical "stop"-to-"arrest" ratio in this country could be well in excess of ten to one. If this is so, then there are well over ten million traffic "stops" each year in America. The constitutional standard that applies to such a large category of cases is worthy of this Court's attention.

There are subtle legal and practical reasons preventing misdemeanor cases such as this one from

reaching this Court's attention. In most driving under the influence cases (as in most criminal cases generally) the defendant pleads guilty to some offense. Few cases are tried and appealed. If a misdemeanor conviction is appealed in California, the Appellate Department is not required to write an opinion or certify it to the California Court of Appeal. (California Rules of Court, Rules 63 and 106.) It is not known how many Appellate Departments write opinions. Even when such opinions are written, they are rarely ordered published in the official reports so that attorneys can cite them in other cases. For example, *People v. Willard*, *supra*, the only such case involving a traffic "stop" based solely on a tip from a lay informant, was published in 1986.

In summary, the paucity of case law regarding traffic "stops" in misdemeanor cases (and the practical reasons for that paucity) argues in favor of granting the writ sought herein especially in light of the millions of mostly innocent Americans whose constitutional rights are impacted by such "stops" each year.

B. The Proliferation Of Cellular Telephones: A report from the Cellular Telecommunications Industry Association indicates that the number of cellular telephone subscribers in this country has risen from 1,608,697 in June of 1988 to 60,8831,431 in June of 1998. In other words, in the past ten years the number of Americans using cellular telephones has increased nearly forty-fold. It should come as a surprise to no one that many Americans are now using their cellular telephones in their motor vehicles. America has frequently been referred to a "a nation on wheels". It will not be too long before cars are sold standard with cellular telephones built into them.

The arrival of the cellular telephone on the scene will have a dramatic effect (if it has not already had one) on law enforcement in this country and the world. Specifically, motorists who wish to contact the police will find it much more convenient to do so with their cellular telephones. Prior to the cellular telephone, motorists who wished to contact the police would have to: (1) drive around and look for a "pay phone"; (2) park their vehicle; (3) get out of their vehicle; (4) place the call; and (5) get back in their vehicle. (Motorists could also try to make contact with patrol cars that might happen to be in the vicinity.)

In this case the CHP ordered petitioner to pull over to the side of the road and stop based solely on a cellular telephone call made by a lay informant as he was driving his pickup truck. Interestingly, the informant in *Willard*, *supra*, did not use a telephone at all. Instead he spoke face-to-face with a police officer in a nearby patrol car. There is no case law in California regarding the validity of a traffic stop for a misdemeanor offense based solely on information received from an untrained lay informant via a cellular telephone.

In summary, the enormous increase in the use of cellular telephones by American motorists, the resulting ease with which the police can be contacted, and the paucity of case law, all argue in favor of granting the writ sought herein.

C. <u>The Constitutional Law With Respect To Traffic Violations Needs Clarification</u>: The Fourth Amendment to the United States Constitution reads in full as follows:

> "The right of the people to be secure in their persons, houses, papers, and

> effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Recently, in *Whren v. United States* (1996) 517 U.S. 806, this Court clarified to some extent how the Fourth Amendment applies to traffic "stops" as follows:

> "Temporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]. [Citations.] An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. [Citations.]" (*Id.* at 809-810 (emphases added.)

This Court went on to hold in *Whren* that:

> "'[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,' . . . which afford the '"quantum of individualized suspicion"' necessary to ensure that police discretion is sufficiently constrained [Citation]." (*Id.* at 817-818 (emphasis added).)

Petitioner herein contends that the foregoing holdings need clarification because the Court's use of the term, "[a]s a general matter", *supra*, has left the door open for states to argue (as respondent did herein) that *Whren*, *supra*, does not apply in cases such as this one because "Whren did away with the notion that 'pretext' stops are unlawful . . . [it] did not alter the doctrine of reasonable suspicion that began with Terry v. Ohio (1968) 392 U.S. 1 and continues today." (RB 6.) Petitioner respectfully suggests that the Court should reject this argument because: (1) the above holding in *Whren* is not limited to pretextual traffic "stops"; and (2) traffic "stops" are not the same as *Terry* stops.

1) The Requirement of Probable Cause Is Not Limited To Pretextual Traffic "Stops": Respondent, in effect, argues that the above holding in *Whren* (i.e., "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred") is limited to pretextual traffic stops. (517 U.S. at 810. See RB 6.) Thus, respondent reads *Whren* to mean: "Pretextual traffic 'stops' are okay as long as they (and they alone) are supported by probable cause; all other traffic 'stops' only require 'reasonable suspicion'."

Petitioner submits that *Whren* was intended to be read as follows: "Pretextual traffic 'stops' are okay because all individualized traffic 'stops' require probable cause." The courts in this country, including this Court, have frequently expressed "disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas." (*Whren*, *supra*, 517 U.S. at 811.) In *Whren* this Court discussed three prior decisions in which it had expressed concerns about pretextual police actions. (*Id.*) However,

the Court in *Whren* emphasized that those concerns do not arise with respect to pretextual traffic "stops" because those earlier decisions involved "the validity of a search conducted in the absence of probable cause." (*Id.* (emphasis in the original).) Thus, the main holding in *Whren* (i.e., that traffic "stops" may be pretextual) is based precisely on the constitutional premise that traffic stops require probable cause.

Prosecutors across America deeply appreciate the holding in *Whren, supra,* that pretextual traffic "stops" are constitutionally permissible. However, if that rule is to be fairly maintained, then so too must the reasons and principles which support it. (Cf. California Civil Code Section 3510: "When the reason of a rule ceases, so should the rule itself.")

Petitioner further respectfully submits that the Court only intended its use of the term, "[a]s a general matter", in *Whren, supra,* to exclude a few specialized categories of traffic "stops", such as border crossings, sobriety checkpoints, and truck weigh stations, which are less intrusive and have not traditionally been subject to the requirement of probable cause when they are administered properly. (See, e.g., *Michigan Dept. of State Police v. Sitz* 496 U.S. 444 (1990)(re sobriety checkpoints); *United States v. Martinez-Fuerte* 428 U.S. 543 (1976)(re border checkpoints).) In other words, the Court did not intend its use of that term to exclude from the requirement of probable cause the most common form of traffic "stop", namely, the decision by a police officer to single out a particular motor vehicle for investigation and order it to pull over to the side of the road and stop (hereinafter referred to as an "individualized traffic 'stop'").

If petitioner is correct in this regard, it is important that the Court grant the writ sought herein and clarify its holding in *Whren, supra*, especially in light of the millions of individualized traffic "stops" which occur each year.

2) A Traffic Stop Is Not A *Terry* Stop: There remains a substantial amount of uncertainty in the law regarding the terms, "stop", "probable cause", "arrest", "probable cause to arrest", "detention", and "take into custody", as those terms relate to individualized traffic "stops". For example, on a document, entitled "Officer's Statement", drafted by the California Department of Motor Vehicles and completed by the CHP officer in this case, there is preprinted the phrase, "PROBABLE CAUSE for stop or contact". (CT 7.) The confusion is also evident as the officer reports that, while petitioner was ordered to pull over to the side of the road at 5:20 p.m. and "arrested" at 5:30 p.m., he was not mirandized until 6:07 p.m. (CT 7. See also CT 1.)

Respondent has repeatedly attempted in this case to equate the traffic "stop" of petitioner with what is commonly referred to in the law as a "*Terry* stop". (See, e.g., RB 6.) A "*Terry* stop" receives its name from the case of *Terry v. Ohio* 392 U.S. 1 (1967) in which the Court upheld the detention of three pedestrians (where they were standing) for questioning by the police when it appeared that they were "casing" a store to commit a felony. Petitioner respectfully submits that an individualized traffic "stop" is in no way analogous to a *Terry* stop because: (1) *Terry, supra*, did not involve motor vehicles, misdemeanor traffic violations, or passengers; and (2) unlike a *Terry* stop (or a checkpoint stop for that matter), an individualized traffic "stop" involves the relocation of one's person and property

(and the person and property of others) to the side of often lonely and unfamiliar stretches of road for what is at most a misdemeanor investigation.

In summary, individualized traffic "stops" involve a far greater invasion of one's Fourth Amendment rights than a *Terry* stop and should therefore be supported by probable cause as the Court in *Whren* has indicated. The continuing lack of certainty in this regard argues strongly in favor of granting the writ sought herein especially in light of the millions of individualized traffic "stops" which occur each year in America.

D. *Willard* Is In Conflict With *Whren*: The case of *People v. Willard* (1986) 183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895, is in need of review under Supreme Court Rule 10(c) for at least two reasons: (1) its holding that "it is well established in California that a police officer may detain and question a [motorist] under circumstances short of probable cause to arrest" (*id.* at 9 (also at App., *infra*, 6a)) conflicts with the above holdings in *Whren v. United States* 517 U.S. 806 (1996); and (2) the question of whether reports of misdemeanor traffic offenses from lay informants (via cellular telephone) are sufficient cause, as *Willard* suggests, for a police officer to order a motorist to pull over to the side of the road and stop is an important question of federal constitutional law which should be settled.

This Court should not be misled by the fact that *Willard*, *supra*, is only a lower intermediate state court of appeal into believing that it is an insignificant or little relied upon authority in this country. In addition to serving as a legal authority which prosecutors may cite in every state court in California, the *Willard* case is discussed by the **Annotated Law Reports** in its article, entitled "What Amounts to Violation of Drunken-

Driving Statute in Officer's 'Presence' or 'View' So As To Permit Warrantless Arrest". (74 ALR3d 1138, Supplement 115, Section 5.) Most of the other cases discussed in Section 5 of that article involve police officers arriving at the scene of a traffic accident. None of them involve a motorist being ordered to pull over to the side of the road as a result of a report from a lay informant. *Willard* is also cited in a major treatise on the subject of driving under the influence cases. (R.J. Essen, **Defense of Drunk Driving Cases**, Vol. 4, Section 45.02[1], p. 45-11, fn. 25.)

The *Willard* case does not deal adequately with the possibility that lay informants may be: (a) untrained at recognizing misdemeanor traffic offenses; (b) venting their "road rage" against fellow motorists by calling in exaggerated reports; and/or (c) malicious pranksters. With respect to the subject of training, even respondent in this case admitted that "[a]n experienced officer may draw inferences and make deductions from observed fact that might well elude an untrained person." (RB 7 (citing *United States v. Cortez* 449 U.S. 411, 418 (1981)). See also *Whren v. United States*, *supra*, 517 U.S. at 817.)

With respect to the subject of cranks and/or pranksters, there was some evidence in this case that, prior to making his report, the lay informant was angered by his perception that petitioner had prevented him from passing. (RT (12-11-97 pm) 58-59.) The problem of cranks and/or pranksters venting their "road rage" and/or warped senses of "humor" through spiteful, exaggerated reports to the police urgently requires the establishment of clearer and more specific standards in this new age of the cellular telephone.

Under our Constitution, motorists and their passengers and property should not be ordered to pull

over to the side of an often lonely stretch of road on the say so of a single, unseen, untrained, inexperienced person who might very well also be a crank or a prankster using the convenience of a cellular phone for revenge or sick amusement. Who would be safe under such a system?

In recent years this Court has taken an increasing interest in the constitutional rights of motorists and their passengers. (See, e.g., *Whren*, supra; *Knowles v. Iowa* (12-8-98) Supreme Court Case No. 97-7597.) The record in this case is fairly well developed for a misdemeanor matter. As such, it provides the Court with a rare opportunity to clarify: (1) the constitutional standards which apply to the millions of traffic "stops" for misdemeanor offenses which happen in America each year; and (2) the role of lay informants using their cellular telephones to report misdemeanors.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

February 11, 1999

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[APPENDIX A]
[Reprinted]

FILED
NOV 23 1998
BY [Deputy Clerk]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DEPARTMENT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	ACR 4135
	)	Municipal Court
v.	)	No. F9672118
TIMOTHY JOSEPH DONOVAN, Defendant and Appellant.	)	ORDER

This appeal came on regularly for hearing and was heard and submitted on Nov. 13, 1998. We hereby AFFIRM.

DATED: 11/13/98 s/_____
DONALD L. CLARK
Presiding Judge

DATED: 11/13/98 s/_____
EUGENE M. HYMAN
Judge

DATED: 11/13/98 s/_____
RONALD T. LISK
Judge

[APPENDIX B]
[Reprinted]

FILED
DEC 14 1998
BY [Deputy Clerk]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DEPARTMENT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	ACR 4135
	)	Municipal Court
v.	)	No. F9672118
TIMOTHY JOSEPH DONOVAN, Defendant and Appellant.	)	ORDER

The application for an order certifying the above entitled case for transfer to the Court of Appeal is DENIED.

DATED: 12/11/98 s/_____
DONALD L. CLARK
Presiding Judge

DATED: 12/11/98 s/_____
MARY ANN GRILLI
Judge

DATED: 12/11/98 s/_____
RONALD T. LISK
Judge

[APPENDIX C]

People v. Willard (1986)
183 Cal.App.3d Supp. 5, 228 Cal.Rptr. 895
[Reprinted (Opinion Only; No Headnotes)]

[183 Cal.App.3d Supp. at 6] BONNEY, J.—The issue presented on this appeal is whether the police officer involved had reasonable cause to detain defendant and investigate [183 Cal.App.3d Supp. at 7] to determine whether defendant was in violation of section 23152, subdivision (a) of the Vehicle Code.

We conclude that reasonable cause did exist and that the ensuing arrest was proper and, therefore, affirm the judgment.

The facts are not in dispute. Police Officer James Buchanan of the Santa Clara Police Department testified at the hearing on the motion that on February 8, 1985, he was on patrol in the area of Stevens Creek and Saratoga and "[a]s I had been driving southbound on Saratoga approaching Stevens Creek, I was hailed by a motorist in the lane beside me. He Informed me that the car behind him was being driven by what he believed to be a drunk, quote, unquote. I looked behind him and saw Mr. Willard's car. Upon looking back at the witness, I saw he was pointing directly at Mr. Willard's car. The witness then drove off, and I pulled in behind Mr. Willard's car and made a traffic stop."

He testified that he stopped defendant solely on the basis of what the motorist told him, that he allowed defendant's car to pass him, pulled in behind defendant, followed him through the intersection of Stevens Creek and Saratoga, then put on his lights and "pulled him over," and that his "main concern was if he made another block, he would be very near a freeway on-ramp."

It is implicit that the officer noticed no erratic driving which formed the basis for the stop. Defendant stopped his vehicle partially in a restaurant driveway, but this fact had no bearing on the officer's decision to stop defendant, which had already been made.

The officer noted defendant had glassy eyes and the odor of alcohol. He administered field sobriety tests, then placed defendant under arrest for the subject violation.

The officer did not know the motorist who described defendant as a drunk, and the motorist's identity was not learned, it appears, until after the stop was made.

Defendant's contentions on this appeal are: 1) the motorist was an anonymous informer and, therefore, not presumptively reliable, and 2) that in any event, the statement of the motorist that the car behind him was being driven by what he thought to be a "drunk" was a mere conclusion and did not contain specific and articulable facts upon which the officer could base a rational conclusion that some activity relating to a crime was occurring and that defendant was involved in that activity in accordance with the require- [183 Cal.App.3d Supp. at 8] ments for detention specified in *In re Tony C.* (1978) 21 Cal.3d 888 [148 Cal.Rptr. 366, 582 P.2d 957].

1. WAS THE MOTORIST A RELIABLE CITIZEN WITNESS?

We conclude that the motorist here was clothed with all the indicia of a reliable citizen witness to crime and that the officer could reasonable rely on what the motorist told him, and further, that in the circumstances here, the fact that the officer did not get the motorist's name and address before detaining defendant did not affect the motorist's reliability. We do not regard the language in *People v. Ramey* (1976) 16 Cal.3d 263 [127 Cal.Rptr. 629, 545 P.2d 1333], a case involving probable cause to arrest, that police must "be aware of the identity of the person providing the information and of his status as a true citizen informant" as mandating in all cases

of detention the furnishing of a name and address or other identifying information to the police if the circumstances otherwise indicate to the officer that the informer is a reliable witness to a crime in progress and is acting in aid of law enforcement. (See *People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579 [173 Cal.Rptr. 544].) The exigency of the situation was apparent. Both the motorist and the officer were in moving traffic, the freeway entrance was a short distance away, and defendant would have been long gone if the officer had detained the motorist to obtain a name and address and enough information to satisfy himself that the motorist was reliable. In addition, there is no evidence that there was anything about the motorist to suggest that he was acting from ulterior motive, and he acted openly, exposing himself to identification. Furthermore, as a motorist on the highway, he, himself, was exposed to the hazard of a drunk driver immediately behind him in his lane of traffic. We conclude from all the facts and circumstances that the motorist was a reliable citizen witness and that the officer could rely on the information he received.

2. DID THE OFFICER OBTAIN SUFFICIENT INFORMATION FROM THE MOTORIST TO JUSTIFY DETENTION?

We conclude that he did, and the facts here satisfy the requirements of *In re Tony C., supra.*

The specific and articulable facts which led the officer here to suspect that criminal activity was taking place and that defendant was involved in that activity were: (1) the reliable statement of the motorist that defendant's car was being driven by a "drunk," and (2) the officer's own concurrent observations of the defendant in the act of driving a vehicle on a public highway.

[183 Cal.App.3d Supp. at 9] Defendant argues that the statement of the motorist to the officer that defendant's car was being driven by a "drunk" was a mere conclusion and there were no factual statements underlying that conclusion

made to the officer on the basis of which the officer himself could have formed an opinion one way or the other as to whether there was cause to believe defendant was indeed drunk. Appellant argues in effect that had the motorist told the officer that he had seen the defendant weaving, or speeding, or running a red light, or that he had spoken to defendant and that his speech was slurred or his eyes glassy, or he smelled of alcohol, that would have been sufficient to justify the detention, but that the absence of these magic recitations of fact in the exigencies of moving traffic renders the detention illegal.

The information of a reliable citizen witness may be taken as true or at "face value" (*People v. Baker* (1970) 12 Cal.App.3d 826 [96 Cal.Rptr. 760]), and we believe the statement that defendant's vehicle was being driven by what the motorist believed was a "drunk" is, and would be commonly understood to be, a statement of a fact observed by the motorist. The objective signs of intoxication are matters of common knowledge and experience. Implicit in the motorist's statement is that he had observed defendant and believed him to be drunk. We find no other common sense explanation for his statement.

Furthermore, it is well established in California that a police officer may detain and question a citizen under circumstances short of probable cause to arrest: "The accepted guideline for temporary stopping for questioning is whether a reasonable man in the same circumstances would believe such conduct necessary to a proper discharge of duties. [Citation.] The strength of the information an officer should have to engage in questioning is necessarily much less than it would be for an arrest. [Citation.] The Supreme Court 'stop and frisk' cases, as summarized in *Terry v. Ohio* . . . have not abolished the California rule permitting a temporary detention for questioning where the officer can point to reasons beyond a mere hunch, for questioning the suspects." (*People v. Stephenson* (1969) 268 Cal.App.3d 908, 910-911

[74 Cal.Rptr. 504]. See also *In re Tony C., supra*, 21 Cal.3d 888; *People v. Flores* (1974) 12 Cal.3d 85 [115 Cal.Rptr. 225, 524 P.2d 353]; *Green v. Dept. of Motor Vehicles* (1977) 68 Cal.App.3d 536 [137 Cal.Rptr. 368]; *People v. Gibson* (1963) 220 Cal.App.2d 15 [33 Cal.Rptr. 775]; *Williams v. Superior Court* (1969) 274 Cal.App.2d 709 [79 Cal.Rptr. 489]; *People v. Martinez* (1970) 6 Cal.App.3d 373 [86 Cal.Rptr. 49]; *People v. Superior Court (Meyer), supra*, 118 Cal.App.3d 579.)

Here, defendant relies on the language in *People v. Ramey, supra*, to the effect that the rule regarding the reliability of a citizen witness ". . . does not, of course, dispense with the requirement that the informant—whether [183 Cal.App.3d Supp. at 10] citizen or otherwise—furnish underlying facts sufficiently detailed to cause a reasonable person to believe that a crime had been committed and the named suspect was the perpetrator . . . ." (16 Cal.3d at p. 269.)

Defendant overlooks the fact that the court in *Ramey* was speaking specifically to the issue of probable cause to *arrest*, not detain, which, of course, requires sufficient information to lead a reasonable person to believe: (1) that a crime has been committed, and (2) that defendant is guilty thereof, and the court in *Ramey* found probable cause to arrest solely on the information furnished by an informant.

The court in *In re Tony C., supra*, 21 Cal.3d 888, however, was careful to ground probable cause to detain on an entirely different footing, and the pertinent language of that case bears rereading. In that case, two juveniles on the public street were detained during the noon hour when school was not in session. They were engaged in no unusual activity, and no recent crimes had been reported in the vicinity which could possibly implicate the two minor defendants. The stop was based on mere hunch.

The court points out that reasonable cause to believe that a crime has in fact been committed and defendant is

guilty thereof is not required in detention, and that indeed a person properly detained may be guilty of no offense, and a salient holding of *In re Tony C., supra*, 21 Cal.3d 888, is that the suspect activity may be consistent with innocent as well as criminal conduct, and the purpose of detention is to resolve that ambiguity: "It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation." (at p. 892.) "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. . . . The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful. . . ." (At p. 893.) "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'" (At p. 894.)

In this case, the officer had reliable information on which he could base a rational suspicion: (1) that criminal activity was in progress (the [183 Cal.App.3d Supp. at 11] report of the motorist that he believed defendant to be drunk), and (2) that defendant was connected with that activity (the officer's own contemporaneous observations of defendant in the act of driving a vehicle on a public highway). We conclude these facts meet the criteria of In re Tony C., supra, for detention and investigation.

The judgment of conviction is affirmed.

Chapman, P.J., and Komar, J., concurred.